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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 640

GREAT LAKES DREDGE & DOCK COMPANY, Owner of the Steamtug *JOHN R. WILLIAMS*,

Petitioner,

against

UNITED STATES OF AMERICA, Owner of Submarine Cable No. 555,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROBERT S. ERSKINE,
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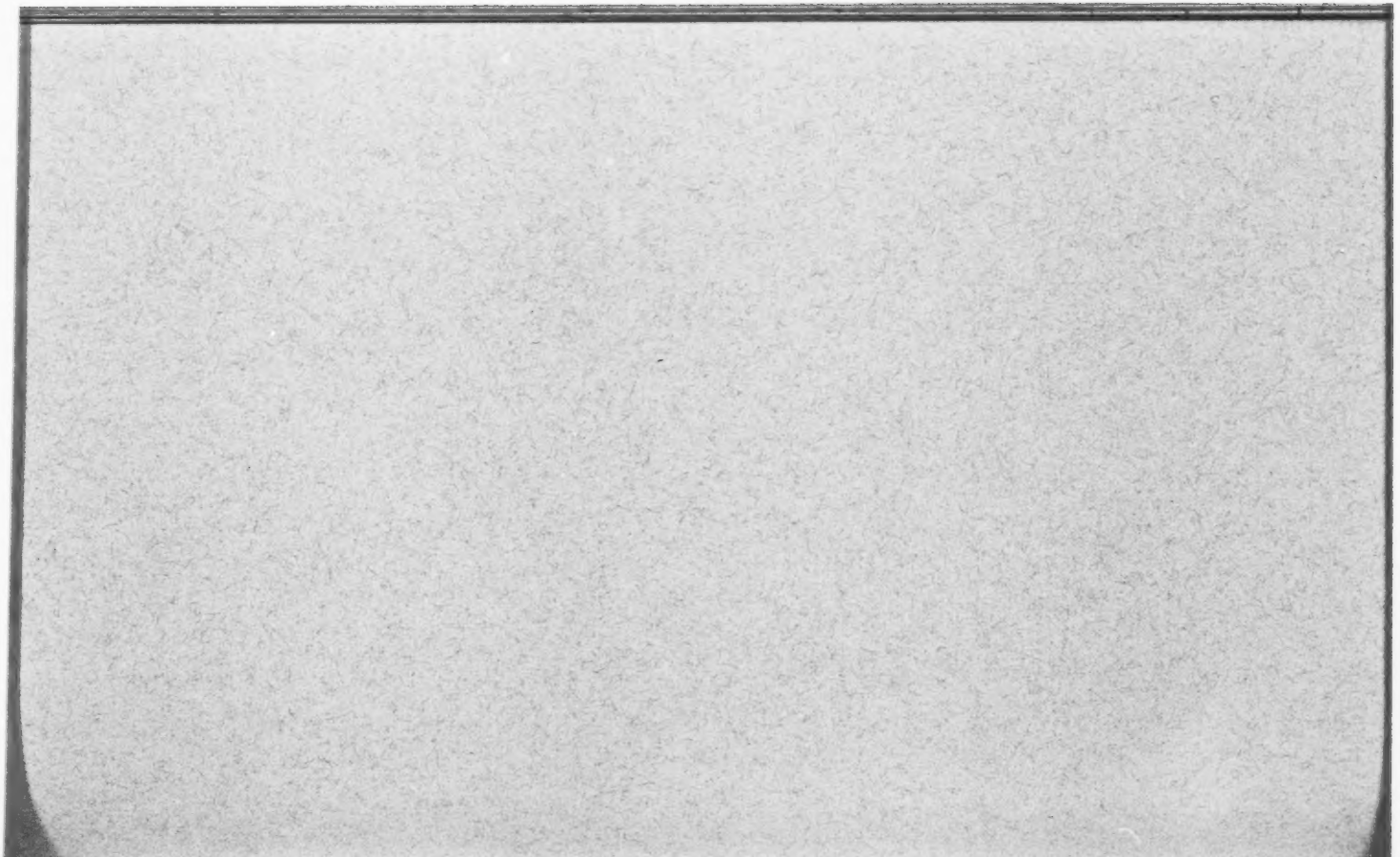


INDEX.

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Jurisdiction	2
Opinions Below	2
Nature of Proceedings and Designation of Parties	2
Questions Involved	3
The Facts	4
Reasons for Allowance of the Writ	7
BRIEF IN SUPPORT OF PETITION	11
FIRST POINT—Having found that the subject matter of the suit is not within the admiralty jurisdiction, the Circuit Court of Appeals should have directed the complete dismissal of the admiralty proceedings, and erred in affirming the decree in admiralty *in personam*	11
SECOND POINT—If any recovery is decreed to the Government in admiralty its damages should not include items of expense which it would have incurred in any event in operating its repair vessel	15
THIRD POINT—The Circuit Court of Appeals adopted to severe a standard, in law, in convicting the master of the tug of negligence on the undisputed facts	17
CONCLUSION—The Petition for writ of certiorari should be granted	18

List of Authorities.

	PAGE
Aktieselskabet v. *Lloyd*, 283 F. 62	9, 13
Armour v. *Ft. Morgan SS Co.*, 270 U. S. 253, 259	9
Atchison etc. Ry. Co. v. *Calhoun*, 213 U. S. 1, 7-9	10, 17
Atlas, The, 93 U. S. 302, 307	15
B. & O. R. R. v. *Goodman*, 275 U. S. 66, 70	17
Baltimore, The, 8 Wall. 377, 385	15
Brooklyn Eastern District Terminal v. *United States*, 287 U. S. 170	4, 9, 16
Confiscation Cases, 87 U. S. 92	15
Cushing, The, 292 Fed. 560, 566	15
Crouch v. *United States*, 8 F. (2d) 435	9, 12
Detroit Trust Co. v. *The Barlum*, 293 U. S. 21, 43	9
F. J. Luckenbach, 42 F. (2d) 279, 280	15
Ford Motor Co. v. *Manhattan Lighterage Corp.*, 97 F. (2d) 577	17
Home Insurance Co. v. *Merchants Transfer Co.*, 16 F. (2d) 372	8, 13
Itasca, The, 117 Fed. 885, 888	16
Kearney, The, 14 F. (2d) 949	9
Manhattan—Bessemer, 1935 A. M. C. 227, 237; 10 F. Supp. 45	16
Maloney v. *Kaplan*, 233 N. Y. 426, 430-431	17
Nippon Yusen etc. v. *Great Western Power Co.*, 17 F. (2d) 239, cert. denied 274 U. S. 745	8, 13
Payne v. *City of New York*, 277 N. Y. 393, 396	17
Sarah, The, 8 Wheat. 391, 394	8, 12, 14
Sevin v. *Inland Waterways Corp.*, 88 F. (2d) 988	8, 14
Standard Oil Co. of Kentucky v. *Noakes*, 59 F. (2d) 897	17
Title 28 U. S. C. (1934 Ed.) §§397, 398	13
Title 28 U. S. C. (1940 Ed.) §723(c)	13

PAGE

Twist v. *Prairie Oil Co.*, 274 U. S. 684, 689 ..... 8, 12

Union Ins. Co. v. *United States*, 73 U. S. 759, 764 ..... 8, 14

United States v. *Hart*, 73 U. S. 770 ..... 8, 14

United States Shipping Board v. *Lustgarten*, 280 U. S. 320 ..... 8, 14

Waldo v. *Wilson*, 231 Fed. 654 ..... 8, 14

Western Union v. *Schriver*, 141 Fed. 538, 550 17

Westfall Larson & Co. v. *Allman-Hubble Tug Boat Co.*, 73 F. (2d) 200 ..... 8, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

GREAT LAKES DREDGE & DOCK COMPANY, Owner of the steamtug *John R. Williams*,

Petitioner,

against

UNITED STATES OF AMERICA, Owner of Submarine Cable No. 555,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Great Lakes Dredge & Dock Company, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered August 12, 1944, under an opinion of that Court filed July 25, 1944, modifying and affirming in part a decree in admiralty of the District Court for the Southern District of New York in a suit of which the subject matter was not within the admiralty jurisdiction.

The petitioner respectfully shows as follows:

Jurisdiction.

The order for mandate below was entered August 12, 1944. (R. 175) Jurisdiction of this Court is provided by 28 U. S. C. §347 (a).

Opinions Below.

The findings and conclusions of District Judge Clancy are not officially reported, but are printed in the Record, (R. 138) and were published in 1941 A. M. C. 1588.

The opinion of District Judge Coxe, overruling exceptions to a Commissioner's report of the recoverable damages, is not officially reported, but is printed in the Record, (R. 155) and was published in 1943 A. M. C. 592.

The opinion of the Circuit Court of Appeals (R. 168), written by Judge A. N. Hand, Judges Learned Hand and Frank concurring, has not yet been reported officially but has been published in 1944 A. M. C. 1061.

The Nature of the Proceedings and the Designation of the Parties.

The petitioner was the appellant in the Court below, and was the respondent and claimant of the tug *John R. Williams* in the District Court. United States of America was the respondent below, and was the libelant in the District Court. To avoid confusion, the petitioner will be referred to herein as the Great Lakes Company, and the respondent will be referred to as the Government.

In the District Court, the Government libelled the Great Lakes Company *in personam,* and its tug *John R. Williams in rem* in admiralty for alleged damage to a submarine telephone cable, No. 555, maintained by the Government

across the bottom of New York Harbor, at The Narrows, between Forts Wadsworth and Hamilton (R. 3). The Great Lakes Company answered, challenging the jurisdiction of admiralty over the subject matter of the suit (R. 8), and, alternatively, contesting liability (R. 7). The Government never sought to remove the proceedings to the common law side of the Court, but took the admiralty suit to trial. The District Court, sustaining the admiralty jurisdiction, awarded to the Government a decree against the tug, *in rem*, and the Great Lakes Company, *in personam*, (R. 158) for a recovery of all the items of damage claimed by the Government, with one exception, (R. 143-156).

On appeal by the Great Lakes Company, the Circuit Court of Appeals held that the subject matter was not within the admiralty jurisdiction and modified the decree below by dismissing the libel *in rem* against the tug *John R. Williams*, but affirmed the decree in admiralty against the Great Lakes Company *in personam* on the Court's own suggestion that the Government's claim could have been asserted at law in the same District Court, that the Great Lakes Company had waived its right to a trial by jury by not demanding such a trial in accordance with Rule 38 of the Federal Rules of Civil Procedure and that therefore the decree *in personam* in admiralty should not be disturbed. (R. 174) The Circuit Court of Appeals refused to upset the decision of the District Court as to liability and the provable damages of the Government (R. 169-171).

The Questions Involved.

1. Whether the Circuit Court of Appeals, after finding that the subject matter of the suit was not within the jurisdiction of admiralty, should not have directed the entire

dismissal of the admiralty proceedings and erred in affirming the decree in admiralty against the Great Lakes Company *in personam.*

2. Whether the Circuit Court of Appeals, by its affirmance of the decree in admiralty *in personam,* after finding that the subject matter of the suit was not within the jurisdiction of admiralty, wrongly deprived the Great Lakes Company of the constitutional right to a trial by jury which it would have had if the Government's claim had been asserted at common law.

3. Whether the Circuit Court of Appeals (if its affirmance of the decree in admiralty *in personam* should be approved), wrongly departed from the rule of *restitutio in integrum,* as approved by this Court in the case of *Brooklyn Eastern District Terminal* v. *United States of America,* 287 U. S. 170, by affirming an award to the Government which included operating expenses of the Government's repair vessel that would have been incurred by the Government in any event.

4. Whether the Circuit Court of Appeals erred in affirming liability of the Great Lakes Company for acts of the master of its tug *John R. Williams,* of which the alleged consequences were wholly unforeseeable.

The Facts

Cable No. 555 is one of two submarine telephone cables lying across the bottom of The Narrows, between Forts Wadsworth and Hamilton (R. 27). The Government offered no evidence of the character of their use. The inference is that Cable No. 555 is used for routine communications between the Forts. There is no evidence and

no inference that it is used as an aid to navigation in any respect.

The area of The Narrows through which the cables are laid is marked upon the Government's charts (R. 29). The only prohibition with respect to that cable area is, as indicated by the warning signs on shore, that vessels shall not drop their anchors within the area (R. 29, 33).

On the morning of August 22nd, 1938, the Great Lakes Company's tug *John R. Williams* was towing a loaded dumpscow out through The Narrows, bound for the dumping grounds below Scotland Lightship. While passing through the aforesaid cable area the tug slowed, in accordance with the customary practice, to permit the War Department's patrol boat to come alongside and pick up the dumping permit required by Government regulations (R. 40, 49-50). The resulting slack in the tug's round 1¾ inch wire towing hawser (R. 49) permitted it to drop below the water, and when the tug attempted to proceed, after surrendering the permit, the hawser was found to be caught on some unknown underwater obstruction, of which the master of the tug had no knowledge or warning (R. 50-53). *Prima facie,* the tug's master had no reason to believe that the round towing hawser had caught or could have caught the round 2-3/16 inch submarine telephone cable (R. 22). Moreover, the underwater obstruction was so solid that it did not yield or give under the strain of the tug's engine and towing machinery (R. 29, 56). The tug was finally obliged to cut the towing bridle of the dumpscow, and when the towing hawser was thus freed and reeled in, its outer length was found to be shaved by something with a sharp edge (R. 52), a condition not explainable by contact with the round submarine telephone cable.

During the time when the tug was attempting to free her towing hawser, an automatic alarm in Fort Wadsworth indicated that Cable 555 had ceased to function (R. 28-29). When the Government's cable repair ship *Joseph Henry* subsequently raised the telephone cable it was found to have been severed, and its appearance indicated that it had been cut by some sharp instrument (R. 103, 115). The commanding officer of the *Joseph Henry* admitted that the tug's towing hawser could not have been the sharp instrument which cut the submarine cable (R. 115).

There is no evidence in the case that the tug's towing hawser ever contacted telephone cable No. 555; and there is no evidence as to how the telephone cable was cut. Nevertheless the District Judge found and concluded that the tug's hawser "was the agent which severed the libelant's cable" and that the tug's captain was negligent in trying to free his hawser from the unknown obstruction while in the cable area (R. 140).

The Government claimed the following damages:

1. Cost of new material used in repairing cable 555	$724.70
2. Fuel and water used by the repair vessel *Joseph Henry* during 8½ days work on cable No. 555	91.65
3. Rations for the *Joseph Henry's* crew, 8½ days	236.25
4. Pay of the *Joseph Henry's* crew, 8½ days	866.07
5. Pro rata share (8½ days) of cost of the annual overhaul of the *Joseph Henry*	244.38
Total	$2,163.05

The Great Lakes Company, reserving its right to appeal on the other points involved, tendered to the Government a decree for the cost of new material, $724.70, with interest and costs to the date of the tender (R. 142). The Government did not accept, but offered proofs before a commissioner appointed by the Court, who reported that the Government should recover all of the items except No. 5 (R. 143-151). His report was confirmed by District Judge Coxe (R. 155).

The Government's proofs before the Commissioner disclosed that the cable repair ship *Joseph Henry* is maintained by the Government on an annual basis; that the expenses of wages, and subsistence of the crew, and fuel accrue daily, even though the vessel is idle during extended periods in each year; that the *Joseph Henry* spent 8½ days in repairing Cable No. 555, during the period from August 26th to September 14th, 1938; that she had no other work to perform during that period; and that, after completing the repairs to Cable No. 555, she was idle for 18 out of the next succeeding 31 days (R. 75, 90-91, 113, 125). The Government failed to show that the use of the *Joseph Henry* in repairing cable No. 555 interfered with her performance of any other work, or resulted in any costs or expenses which the Government would not have incurred in any event, excepting the item for new material, $724.70.

Reasons for Allowance of the Writ.

1. Having found that the Government's suit was based on a non-maritime tort which was not within the admiralty jurisdiction, the Circuit Court of Appeals dismissed the libel only as against the tug *in rem*, and affirmed the decree in admiralty against the Great Lakes Company *in personam*, and that ruling should be reviewed by this Court for the following reasons:

A. The affirmance, in part, of a decree in admiralty, when admiralty was without jurisdiction, and the failure to direct a complete dismissal of the proceedings for lack of admiralty jurisdiction raises an important question of Federal law which has not been, but should be, passed upon and settled by this Court.

B. The failure to direct a complete dismissal of the libel for lack of admiralty jurisdiction would seem to be in conflict with the rulings of this court in *The Sarah,* 8 Wheat. 391; *United States* v. *Hart,* 73 U. S. 770; *Union Insurance Co.* v. *United States,* 73 U. S. 759; *U. S. Shipping Board* v. *Lustgarten,* 280 U. S. 320, and the decisions of this Court referred to in *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, at p. 689.

C. The failure to direct a complete dismissal of the libel for lack of admiralty jurisdiction and the affirmance of the admiralty decree against the Great Lakes Company *in personam* on the ground that the Government's cause of action could have been asserted in the same District Court at common law is in conflict with decisions of the Circuit Court of Appeal for the Ninth Circuit. *Westfall Larson & Co.* v. *Allman-Hubble Tug Boat Co.* 73 F. (2d) 200; *Nippon Yusen Kabushiki Kaisha* v. *Great Western Power Co.,* 17 F. (2d) 239, cert. denied 274 U. S. 745; and *Home Insurance Co.* v. *Merchants Transport Co.* 16 F. (2d) 372, and appears to be in conflict with the law of the Fourth and Fifth Circuits. *Waldo* v. *Wilson* (4th C.) 231 Fed. 654; *Sevin* v. *Inland Waterways Corp.* (5th C.) 88 F. (2d) 988.

2. In holding that the Great Lakes Company waived its constitutional right to trial by jury by failing to demand it in a proceeding commenced and determined in admiralty, in which issue had been joined as to the jurisdiction of admiralty, and which the District Court had held to be

within the admiralty jurisdiction, the Circuit Court of Appeals rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Crouch* v. *United States*, 8 F. (2d) 435, and decided an important question of Federal law which has not been, but should be, settled by this Court.

3. In holding that, because the Government's claim could have been asserted in the same District at common law, compliance with Rule 38 of the Federal Rules of Civil Procedure in a proceeding commenced and determined in admiralty was necessary to preserve the constitutional right to a trial by jury, the Circuit Court of Appeals decided an important question of Federal Law which has not been, but should be, settled by this Court.

4. The decision of the Circuit Court of Appeals is without statutory authority or rule of this Court and is in apparent conflict with the constitutional and statutory limitations of a court of admiralty jurisdiction referred to in *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 43; *Aktieselskabet* v. *Lloyd* (CCA. 2nd) 283 F. 62, approved by this court in *Armour* v. *Ft. Morgan SS Co.* 270 U. S. 253, 259; and *The Kearney* (CCA 3rd C.) 14 F. (2d) 949; and is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

5. The Circuit Court of Appeals, having sustained an admiralty decree *in personam* on an admiralty appeal, rendered a decision, on a Federal question, in conflict with the decision of this court in *Brooklyn Eastern Terminal* v. *United States*, 287 U. S. 170, in holding that the Government could recover damages for operating expenses of its repair vessel which it would have incurred in any event,

and which were not the result of any damage to cable No. 555.

6. In affirming the finding of the District Court that the navigator of the tug *John R. Williams* was negligent, the decision of the Circuit Court of Appeals is in conflict with the standard, in law, as heretofore laid down by this Court that unforeseeable consequences of an act may not be asserted in *tort* against the person performing the act. *Atchison etc. Ry. Co.* v. *Calhoun,* 213 U. S. 1, 7-9.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision below.

GREAT LAKES DREDGE & DOCK COMPANY,

By Robert S. Erskine,
Counsel for Petitioner.

Dated New York, October 25th, 1944.

IN THE

Supreme Court of the United States

GREAT LAKES DREDGE & DOCK COMPANY, Owner of Steamtug *John R. Williams*,
Petitioner,
against
UNITED STATES OF AMERICA, Owner of Submarine Cable 555,
Respondent.

October Term
1944
No. .....

BRIEF IN SUPPORT OF PETITION.

The facts involved, and the proceedings in the lower courts are set forth in the petition.

FIRST POINT.

HAVING FOUND THAT THE SUBJECT MATTER OF THE SUIT IS NOT WITHIN THE ADMIRALTY JURISDICTION, THE CIRCUIT COURT OF APPEALS SHOULD HAVE DIRECTED THE COMPLETE DISMISSAL OF THE ADMIRALTY PROCEEDINGS, AND ERRED IN AFFIRMING THE DECREE IN ADMIRALTY *in personam*.

The Government's allegation of the admiralty jurisdiction (R. 5) was challenged by the Great Lakes Company, (R. 8); and the suit proceeded to trial on that joinder of issue, the District Court holding that there was admiralty jurisdiction, and the Circuit Court of Appeals holding that there was not. No motion or suggestion was made by the Government in either Court that the proceedings be transferred to or commenced anew at common law.

There is no right to a trial by jury in admiralty and the Federal Rules of Civil Procedure do not apply in that Court. It is, therefore, difficult to understand how the Great Lakes Company waived the right to a trial by jury which it would have had at common law by failing to demand a right which did not exist in admiralty. The Government, in persisting in its efforts to establish the admiralty jurisdiction, did so at its peril, as would be true in any case in which the jurisdiction of the Court is challenged, *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 689; and the Great Lakes Company was under no compulsion to protect the Government against a subsequent denial of jurisdiction. When the Circuit Court of Appeals found that admiralty did not have jurisdiction, its affirmance of the admiralty decree *in personam* deprived the Great Lakes Company of the constitutional right to trial by jury which it would have had at law. On that point the decision below is in conflict with the law of the 4th Circuit, as stated in *Crouch* v. *United States,* 8 F. (2d) 435.

The decision of the Circuit Court of Appeals goes still deeper, to the question of the power of a court to decree and enforce a recovery of damages from a defending party when the court is without jurisdiction.

The jurisdictional limits of Courts of admiralty, equity and common law are distinct and separate even when those courts are sitting in the same geographical District. In *The Sarah,* 8 Wheat 391, Chief Justice Marshall, commenting on the separate jurisdiction of admiralty and common law, said, at 394:

> "Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law."

It was necessary for Congress to enact statutes to permit the transfer of actions from the common law side to the equity side of the Federal courts, to permit cross bills in equity and equitable claims and equitable defenses to be interposed in common law actions, and to permit the uniting of equity and law, Title 28 U. S. C. 1934 Ed. Secs. 397 and 398; Title 28 U. S. C. (1940 Ed.) Sec. 723(c). Congress has not enacted legislation to permit the transfer of admiralty proceedings to common law, or to combine admiralty suits with those of other jurisdiction, and the admiralty jurisdiction is still separate and distinct as it was when the case of *The Sarah* was decided. In *Aktieselskabet* v. *Lloyd*, 283 Fed. 62, subsequently approved by this Court in *Armour* v. *Ft. Morgan S. S. Co.* 270 U. S. 253, 259, it was held that a cause of action of non-maritime nature could not be joined with a suit in admiralty by an impleading petition.

Consequently, in the case at bar, when the Circuit Court of Appeals found that the suit was not within the jurisdiction of admiralty, it should have directed the complete dismissal of the admiralty proceedings and had no power to affirm the *in personam* portion of the admiralty decree upon some theory of an indirect and hybrid merger of admiralty and common law.

The Circuit Court of Appeals for the 9th Circuit in *Westfall etc.* v. *Allman-Hubble Tug Boat Co.* 73 F (2d) 200; *Nippon Yusen etc.* v. *Great Western Power Co.* 17 F (2d) 239, cert. denied 274 U. S. 745, and *Home Ins. Co.* v. *Merchants Transport Co.* 16 F (2d) 372, directed complete dismissal of the libels because of the lack of admiralty jurisdiction, even though the records in those cases indicate that the several libelants might have asserted their claims at common law in the same Districts.

Conversely, this Court in *U. S. Shipping Board* v. *Lustgarten,* 280 U. S. 320, and the Circuit Courts of Appeals for the 4th and 5th Circuits in *Waldo* v. *Wilson,* 231 Fed. 654 and *Sevin* v. *Inland Waterways Corp.* 88 F (2d) 988, directed the dismissal of complaints at law for lack of jurisdiction, upon finding that the claims should have been asserted in admiralty or in equity.

The practice adopted by the Circuit Court of Appeals for the Second Circuit in its earlier decisions cited in its opinion herein (R. 174) and applied to the case at bar, appears to rest upon a misconception of the decisions of this Court in statutory proceedings for seizures, forfeitures, and confiscations. Such proceedings are commenced by the filing of "libels of information", and although forms, modes, and terminology analogous to those used in admiralty, apply to such proceedings, admiralty jurisdiction with respect to them exists only when the seizures, etc., occur upon the navigable waters.

> "Such proceedings do not necessarily constitute a cause in admiralty. When instituted for condemnation of property on land, they have relation exclusively to matters which, in their nature, are not of admiralty cognizance." *Union Insurance Co.* v. *United States,* 73 U. S. 759, 764.

This Court has repeatedly held that when libels of information with respect to seizures etc., on land are improperly filed in admiralty the proceedings in admiralty must be dismissed in their entirety because of lack of jurisdiction. *The Sarah,* 8 Wheat, 391; *United States* v. *Hart,* 73 U. S. 770; *Union Ins. Co.* v. *United States,* 73 U. S. 759. In those cases the Court ruled that a party cannot be deprived of his right to a trial by jury at common law by

a proceeding in admiralty over which admiralty has no jurisdiction; and those decisions lend no support to the proposition that a decree in admiralty, although without jurisdiction, can be affirmed on the theory that the cause of action could have been asserted at law in the same district.

In the *Confiscation Cases*, 87 U. S. 92, this Court reached the conclusion that, in spite of terminology analogous to admiralty, the proceeding with respect to condemnations on land had been properly commenced and disposed of at law as a "common-law proceeding *in rem*," and, in approving the trial proceedings at common law without a jury, pointed out that that was due to the defendant's default and failure to traverse the facts alleged in the information. That decision lends no support to but conflicts with the ruling of the Circuit Court of Appeals in the case at bar.

SECOND POINT.

IF ANY RECOVERY IS DECREED TO THE GOVERNMENT IN ADMIRALTY ITS DAMAGES SHOULD NOT INCLUDE ITEMS OF EXPENSE WHICH IT WOULD HAVE INCURRED IN ANY EVENT IN OPERATING ITS REPAIR VESSEL.

In assessing damages, admiralty has long adhered to the rule of *restitutio in integrum*, limiting a recovery *in tort* to the actual pecuniary loss suffered. *The Baltimore*, 8 Wall 377, 385; *The Atlas*, 93 U. S. 302, 307; *The Cushing*, 292 Fed. 560, 566; *The F. J. Luckenbach*, 42 F(2d) 279, 280.

In the case at bar, the disputed items of the Government's claim were allowed by the Circuit Court of Appeals on the express theory that the Government would have incurred substantial expense if it had employed an inde-

pendent vessel to repair Cable No. 555, (R. 170-171) But the Government did not incur the expense of an independent vessel, and an allowance of the disputed items on the basis stated would seem to be contrary to the decision of this Court in *Brooklyn Eastern District Terminal* v. *United States,* 287 U. S. 170.

The District Court, confirming the Commissioner's report, asserted that Great Lakes Company was objecting to the disputed items on the ground that the repair work had been performed by the Government itself, (R. 155). The objection is not on that basis. The objection is that the expenses of operating the *Joseph Henry* would have been incurred by the Government even if there had been no damage to Cable No. 555 because of the payment of wages etc., upon an annual basis, and that therefore those expenses do not represent any pecuniary loss to the Government in connection with the damage to Cable No. 555.

The facts are similar to the case in which a vessel owner's marine superintendent devotes a substantial portion of his time to supervising collision repairs necessitated by the tortious act of another party. If the marine superintendent is on an annual salary, and if he supervises the owner's repairs without neglecting his other duties, no *pro rata* portion of his annual salary can be set up as part of the owner's damages. *The Itasca,* 117 Fed. 885, 888. A similar ruling by a Commissioner in *The Manhattan—The Bessemer* 1935 A. M. C. 227, 237, was confirmed in 10 F. Supp. 45.

THIRD POINT.

THE CIRCUIT COURT OF APPEALS ADOPTED TOO SEVERE A STANDARD, IN LAW, IN CONVICTING THE MASTER OF THE TUG OF NEGLIGENCE ON THE UNDISPUTED FACTS.

The standard on which the acts of a vessel's navigator should be judged is a question of law. *Ford Motor Co.* v. *Manhattan Lighterage Corp.* 97 F. (2d) 577; *B. & O. R. R.* v. *Goodman* 275 U. S. 66, 70; *Maloney* v. *Kaplan* 233 N. Y. 426, 430-431; *Standard Oil Co. of Kentucky* v. *Noakes,* 59 F. (2d) 897, 898.

In the case at bar, the Circuit Court of Appeals has approved findings of negligence by the District Court which conflict with the previously established standard that a person should not be chargeable in tort, with unforeseeable consequences of his acts. *Atchison Ry. Co.* v. *Calhoun,* 213 U. S. 1; *Ford Motor Co.* v. *Manhattan Lighterage Corp.,* 97 F. (2d) 577; *Western Union* v. *Schriver* 141 Fed. 538, 550; *Payne* v. *City of New York,* 277 N. Y. 393, 396.

The master of the tug *John R. Williams* could not have foreseen a physical impossibility,—i.e., that the round wire towing hawser could catch or cut the round lead-sheathed submarine cable; and when the towing hawser was found caught on some unknown heavy immovable obstruction, the master could not have foreseen that the strain of the tug's engine on the hawser would result in the cutting of the submarine cable by some sharp instrument whose presence he had no reason to suspect, and which was never found or identified by the Government.

The decision of the Court below, unless corrected, would result in liability for any submarine cable damage which is thought to have resulted from some act committed by a

vessel's navigator in a defined "cable area", no matter how indirect and unforeseeable that damage may have been, and even though no proofs are offered to show how the act resulted in the damage.

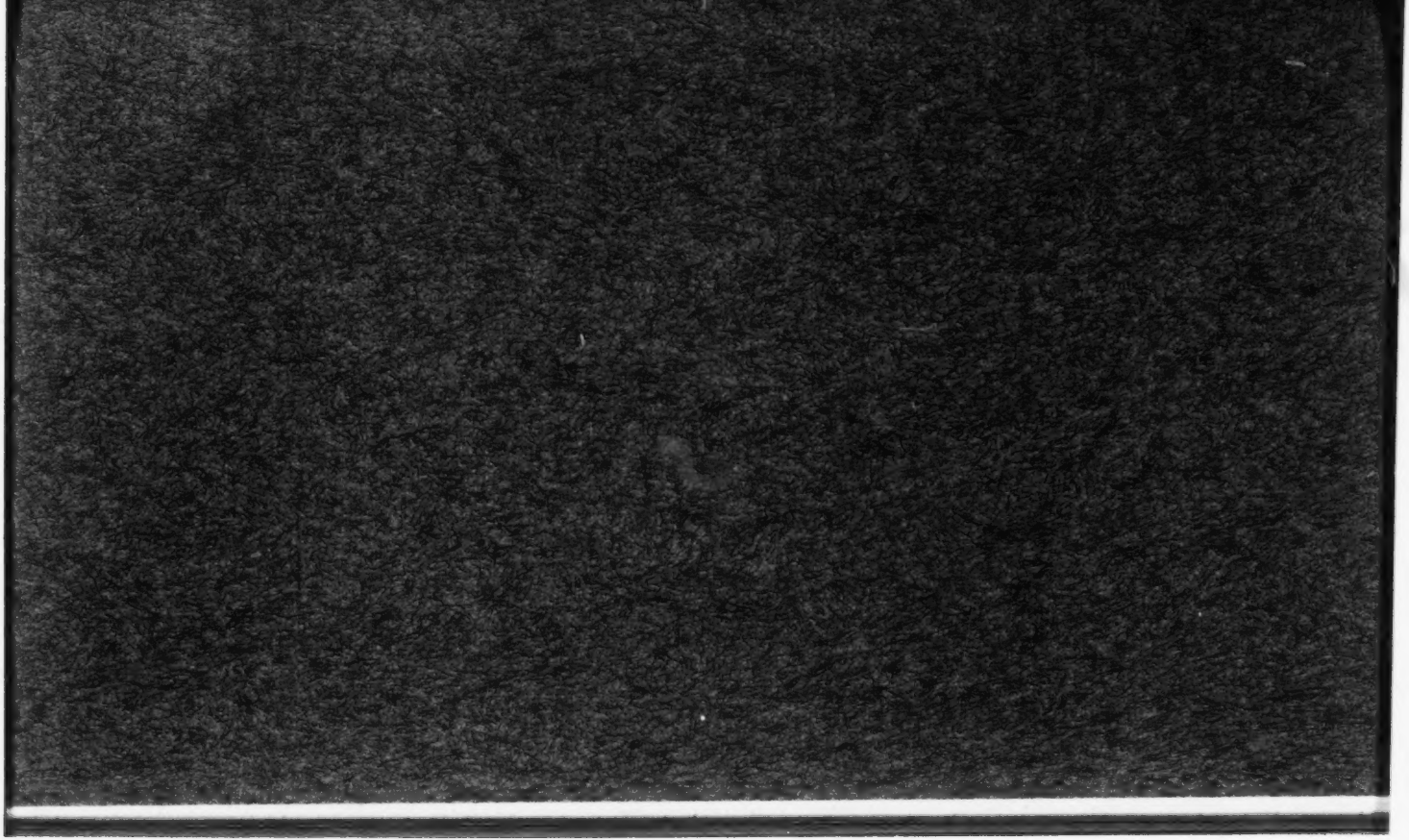
CONCLUSION.

The Petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. ERSKINE,
Counsel for Petitioner.

New York, N. Y.,
October 25th, 1944.



INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:	
A. A. Raven, The, 231 Fed. 380	10
Barbara Cates, The, 17 F. Supp. 241	9
Cayuga, The, 7 Blatchf. 385, affirmed 14 Wall. 270	10
Cleveland Terminal and Valley R. R. Co. v. *Cleveland Steamship Co.*, 208 U. S. 316	6
Commonwealth, The, 297 Fed. 651	10
Cory Bros. & Co. v. *United States*, 51 F. (2d) 1010	7
Crouch v. *United States*, 8 F. (2d) 435	9
Favorita, The, 18 Wall. 598	10
Home Ins. Co. v. *Merchants' Transp. Co.*, 16 F. (2d) 372	8
James Richardson & Sons v. *Conners Marine Co.*, 141 F. (2d) 226	7, 8, 9
Johnson v. *Chicago and Pacific Elevator Co.*, 119 U. S. 388	6
Louis-Dreyfus v. *Paterson Steamships, Ltd.*, 43 F. (2d) 824	7
Mayor, The, 36 Fed. 716	10
Owens v. *Breitung*, 270 Fed. 190	7
Portland General Electric Co. v. *United States*, 142 F. (2d) 552, certiorari denied October 23, 1944	6
Poughkeepsie, The, 162 Fed. 494, affirmed *per curiam* 212 U. S. 558	6
Prince Line v. *American Paper Exports, Inc.*, 55 F. (2d) 1053	7, 9
Sarah, The, 8 Wheat. 391	7
Troy, The, 208 U. S. 321	6
United States v. *Byers*, 144 F. (2d) 455	6
United States ex rel. Pressprich & Son Co. v. *James W. Elwell & Co.*, 250 Fed. 939, certiorari denied, 248 U. S. 564	7, 9
Westfall Larson & Co. v. *Allman-Hubble Tug Boat Co.*, 73 F. (2d) 200	8
Statutes:	
Tucker Act:	
28 U. S. C. § 41 (1)	7
28 U. S. C. § 41 (20)	9
Miscellaneous:	
Rule 6, Federal Rules of Civil Procedure	9
Rule 38, Federal Rules of Civil Procedure	9
Clark, *The Union of Law and Equity*, 25 Col. L. Rev. 1	8

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 640

GREAT LAKES DREDGE & DOCK COMPANY, OWNER OF THE STEAM TUG "JOHN R. WILLIAMS," PETITIONER

v.

UNITED STATES OF AMERICA, OWNER OF SUBMARINE CABLE NO. 555

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the District Court of the United States for the Southern District of New York (R. 138–140) are reported in 1941 A. M. C. 1588. The opinion of the district court (R. 154–156) overruling exceptions (R. 152–154) to a commissioner's report on damages (R. 143–151) is reported in 50 F. Supp. 409. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 168–174) is reported in 144 F. (2d) 451.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on August 12, 1944 (R. 174–175). The petition for a writ of certiorari was filed on October 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In a suit in admiralty for damages to a submarine cable, alleged to have been caused by the fault of petitioner and its tug, the district court entered a decree *in rem* against the tug and *in personam* against petitioner. The court below, on appeal, held that the suit did not fall within admiralty jurisdiction and vacated the decree *in rem*, but affirmed the decree *in personam* as within the jurisdiction of the district court at law. The questions presented are:

1. Whether such action of the court below denied petitioner a right to trial by jury, it appearing that although petitioner challenged the admiralty jurisdiction in the district court, it at no time requested a trial by jury.

2. Whether both courts below erred in holding that petitioner was at fault and in assessing the damages for the repair of the cable.

STATEMENT

The United States, respondent herein, owned a submarine telephone cable designated as Cable

No. 555 lying across the Narrows at the entrance to New York Harbor and connecting Fort Wadsworth and Fort Hamilton (R. 3–4, 27–28). On the morning of August 22, 1938, the petitioner's Tug *John R. Williams* was proceeding out through the Narrows to the dumping grounds with a loaded dump scow in tow on a single steel hawser and bridle (R. 4, 7–8, 12, 17, 48–49). The tug had out about 800 feet of hawser (R. 12, 17, 50, 61–62, 129). In the Narrows, at a point 80 feet deep (R. 40), within an area marked "cable area" on U. S. Coast & Geodetic Survey Chart 369, it was necessary for the tug to slow down so that a patrol boat operated by the War Department might come alongside and pick up a required permit (R. 4, 8–9, 12, 17, 36–38, 50–51, 129). At that time the tide was ebbing, so that when the tug slowed down the hawser between it and the dump scow slackened and dropped under water (R. 9, 37, 50) and the scow moved at least 300 feet closer to the tug (R. 29–31, 37, 50, 62). After surrendering her permit, the tug started forward at one-half speed (R. 9, 37, 51, 129) but immediately listed heavily to port (R. 9, 51, 129). This indicated to her master that her towing hawser was caught on something (R. 9, 51, 60, 129). He slowed down his engines to about one-third speed (R. 51, 60–61, 129) and attempted to heave the hawser clear by means of the tug's steam towing reel (R. 51). When this proved unavailing (R. 51), the hawser's outer

end was freed by cutting the bridle on the bow of the scow (R. 9, 51–52, 129). The tug was then able to reel in its hawser and did so (R. 52, 56–57, 129). About 150 feet of the hawser was cut and "badly shaved" (R. 9, 52, 129).

An alarm system, under constant surveillance, was maintained at Fort Hamilton to give warning in the event the cable connecting that fort with Fort Wadsworth should be damaged (R. 28). At 10:39 a. m., August 22, 1938, the alarm signalled that the cable was out of order (R. 123). This was immediately reported to the officer in charge (R. 27–28, 34–35, 123–124) who looked out over the cable area and saw the Tug *John R. Williams* and her scow (R. 29–31, 36–38). There were no other ships in the cable area at the time (R. 30). Subsequent inspection of Cable No. 555 indicated that it had been broken in two and that it looked "as if it had been subjected to quite a strain just before parting" (R. 103).

On April 9, 1940 (R. 1), respondent filed a libel in admiralty (R. 3–6) against petitioner and its Tug *John R. Williams* charging them with fault and negligence resulting in the fouling of Cable No. 555 (R. 3–5) and seeking damages in the amount of $4,000 (R. 5). Petitioner filed an answer (R. 7–10) challenging the alleged admiralty jurisdiction (R. 8; Pet. 8, 11), admitting the essential facts asserted by respondent (R. 7–9), but denying that the tug's hawser caused any

damage to Cable No. 555 (R. 9) or that there was any fault or negligence in the navigation of the tug at the time in question (R. 10). The petitioner did not request, in the answer or otherwise, a trial by jury.

The district court, after trial (R. 26–66), ruled that there was admiralty jurisdiction (R. 140), made findings of fact (R. 138–140) and entered an interlocutory decree for respondent (R. 141). The district court (R. 139–140) found the facts substantially as set forth *supra* and concluded that petitioner had severed respondent's cable; that the tug captain, "on notice that he was in a cable area," was negligent in "running his boat for fifteen minutes at one-third speed and raising his hawser with the towing machine within the cable area" "when he recognized his hawser was fouled;" that this negligence was the proximate cause of the injury to the respondent's cable; and that the court had jurisdiction of the proceeding (R. 140). The court referred the matter to a commissioner to determine the amount of damages due to respondent (R. 141).

After a hearing (R. 67–95), the commissioner filed his report (R. 143–151) allowing respondent $1,918.67 as damages, consisting of the cost of cable material used to make repairs and the cost of maintenance of the respondent's cable ship and its men while engaged in repair work. The district court entered a final decree in favor of respondent for this amount against petitioner *in*

personam and against the tug *in rem* (R. 154–160).

On appeal, the Circuit Court of Appeals held that this suit was "not maintainable in admiralty," in that Cable No. 555 was not an aid to navigation in the maritime sense. It accordingly vacated the decree of the district court against the tug and dismissed the libel against the tug (R. 174–175). However, the court also held that the suit "is good at law" (R. 174), and therefore affirmed the decree *in personam* against petitioner (R. 174–175).

ARGUMENT

Respondent has not sought review of the ruling below that this suit was "not maintainable in admiralty" (R. 174). That decision finds support in numerous decisions. *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 388; *Cleveland Terminal and Valley R. R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *The Troy*, 208 U. S. 321; *The Poughkeepsie*, 162 Fed. 494 (S. D. N. Y.), affirmed *per curiam*, 212 U. S. 558; *Portland General Electric Co.* v. *United States*, 142 F. (2d) 552 (C. C. A. 9), certiorari denied October 23, 1944; cf. *United States* v. *Byers*, 144 F. (2d) 455 (C. C. A. 2).

We submit that the questions presented by the petition for certiorari do not warrant further review since their determination below was clearly correct.

1. It is not denied that the cause of action for damage to the cable was one which the district court had jurisdiction to entertain at law (28 U. S. C. § 41 (1)). Consequently, after vacating the decree *in rem* against the tug for want of admiralty jurisdiction, the court below was clearly correct in affirming the district court's decree *in personam* as to petitioner. For when "every fact appears, necessary to the jurisdiction of the court on the law side," "when a cause of action is within the substantive jurisdiction of the District Court for any reason, it does not mar that jurisdiction that the suitor proceeds as libellant in the admiralty rather than as plantiff at law." *Prince Line* v. *American Paper Exports, Inc.*, 55 F. (2d) 1053, 1056 (C. C. A. 2); *United States ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, 250 Fed. 939 (C. C. A. 2), certiorari denied, 248 U. S. 564; *Owens* v. *Breitung*, 270 Fed. 190 (C. C. A. 2); *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. (2d) 226, 229 (C. C. A. 2); cf. *The Sarah*, 8 Wheat. 391; *Cory Bros. & Co.* v. *United States*, 51 F. (2d) 1010, 1013 (C. C. A. 2); *Louis-Dreyfus* v. *Paterson Steamships, Ltd.*, 43 F. (2d) 824, 828 (C. C. A. 2).[1] To require dismissal of the entire suit and institu-

[1] The cases cited by the petitioner (Pet. 8) as in conflict with the decision below do not support its argument. In *The Sarah*, 8 Wheat. 391, this Court, finding that the subject matter of the suit was not within the admiralty jurisdiction, did not direct a dismissal but, rather, remanded the proceeding to the district court so as to permit the libel to be amended to allege facts stating a cause of action at law. Such a re-

tion of another with identical allegations would be just "such compartmentalizing of litigation * * * and waste in time and expense of litigants, [as] is no longer tolerated as between jurisdiction in equity and law, and should not be encouraged as between admiralty and law." *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. (2d) 226, 229 (C. C. A. 2); cf. Clark, *The Union of Law and Equity*, 25 Col. L. Rev. 1, 9,

2. Petitioner contends (Pet. 12) that by being sued in admiralty and then having the final decree treated as one at law, he was deprived of the right of trial by jury. But, as the court below found, petitioner "laid no foundation for availing itself of that right by demanding such a trial in accordance with Rule 38" of the Federal Rules of Civil Procedure (R. 174). While petitioner raised the issue of lack of admiralty and maritime jurisdiction in the district court (R. 8, 171; Pet. 8, 11) as well as in the Circuit Court of Appeals (R. 162), at no time did it request a trial of the issues to

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mand in the instant proceeding would be a vain act since the present libel states facts which do constitute a cause of action at law. In *Westfall Larson & Co.* v. *Allman-Hubble Tug Boat Co.*, 73 F. (2d) 200 (C. C. A. 9), and *Home Ins. Co.* v. *Merchants' Transp. Co.*, 16 F. (2d) 372 (C. C. A. 9), the court upheld the decision of a district court which had sustained exceptions to a libel in admiralty for want of jurisdiction. In neither these cases nor the other decision of the C. C. A. 9th, cited by petitioner (Pet. 8), did it appear affirmatively, as in the instant proceeding, that the requirements were present necessary to give the district court jurisdiction at law. None of the other decisions alleged to present a conflict (Pet. 8) is in point.

a jury. "The formal denial of the jurisdiction of the admiralty side was not enough to preserve the right." *Prince Line* v. *American Paper Exports, Inc.*, 55 F. (2d) 1053, 1057 (C. C. A. 2). Not having claimed a jury trial either when it first denied the admiralty jurisdiction or at any seasonable time thereafter, petitioner must be held to have waived trial by jury. Rules 38 (b) and (d) and 6 (b), F. R. C. P.; *Prince Line* v. *American Paper Exports, Inc., supra; The Barbara Cates*, 17 F. Supp. 241, 244 (E. D. Pa.); cf. *United States ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, 250 Fed. 939 (C. C. A. 2), certiorari denied, 248 U. S. 564. See *James Richardson & Sons* v. *Conners Marine Co.*, 141 F. (2d) 226, 230 (C. C. A. 2).[2]

3. Petitioner challenges the decision below that it was liable not only for the cost of the materials necessary to repair the Government's cable, but

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[2] *Crouch* v. *United States*, 8 F. (2d) 435 (C. C. A. 4), cited by the petitioner (Pet. 9) as in conflict with the decision below, does not support its argument. There the court remanded a war risk insurance case against the United States "for a trial according to law," since it appeared that the trial judge as well as counsel for both parties had proceeded with the trial of the case without a jury under the mistaken belief that the case was governed by the Tucker Act, 28 U. S. C. § 41 (20), which provides for trial without jury. The court held that in those circumstances there was no consent to waive a jury trial. Here the petitioner could not have made such a mistake, not only because of the well-settled nature of the law on the subject, particularly in the Second Circuit, but also because the petitioner itself asserted the lack of admiralty jurisdiction (R. 8, 171; Pet. 8, 11).

also for the operating expenses of respondent's cable ship while engaged in the repair work. The court below properly disposed of the contention, observing that "if the government had not maintained such a vessel it would have had to employ an outside contractor to make the repairs. We can see no reason why the [petitioner], who caused the damage to the government's cable, should not pay the expense of the repairs while they were being made" (R. 170–171). See *The Favorita,* 18 Wall. 598; *The Cayuga,* 7 Blatchf. 385, affirmed, 14 Wall. 270; *The A. A. Raven,* 231 Fed. 380 (C. C. A. 3); *The Commonwealth,* 297 Fed. 651 (S. D. N. Y.); *The Mayor,* 36 Fed. 716 (S. D. N. Y.).

Petitioner also argues that in finding the master of the tug guilty of negligence the district court and the court below have held petitioner liable in tort for the unforeseeable consequences of its servant's act (Pet. 10, 17, 18). The undisputed facts adequately answer this contention.[3]

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[3] The tug was passing through a cable area, appropriately marked on Coast and Geodetic Survey charts (R. 4, 8, 12, 17); the 800-foot long steel hawser (R. 12, 17, 50, 61–62, 129), one and three-quarters-inches thick (R. 49), by which the tug was towing a scow, slackened so as to fall beneath the surface of the water (R. 9, 37, 50) and became firmly entangled in an obstruction (R. 9, 51, 60, 129). In these circumstances, the master of the tug could reasonably foresee that if he tried to pull the hawser loose by main force, by attempting to reel it in on a steam reel (R. 51) and by running his engines forward for 15 minutes (R. 51, 60–61, 129), he would damage the cables known to be lying at the bottom of the area. These facts, amply supported by the evidence, were found by the district court and affirmed by the Circuit Court of Appeals.

CONCLUSION

The decision below is clearly correct and there is no conflict of authorities. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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